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9 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAMUEL L. GENSAW III, et al.,

CASE NO.: C-07-3009-TEH

11 Plaintiffs,

**REPLY IN SUPPORT OF MOTION TO
DISMISS COMPLAINT**

12 vs.

13 DEL NORTE COUNTY UNIFIED
SCHOOL DISTRICT, et al.,

DATE: March 3, 2008

TIME: 10:00 a.m.

CTRM: 12, 19th Floor

14 Defendants.
15

Honorable Thelton E. Henderson

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1 The constitutional (Equal Protection Clause) and factual basis of plaintiffs' § 1983
 2 and Title IV claims are *identical*. Based on the authorities cited above, and those in
 3 defendants' initial memorandum, plaintiffs' § 1983 claim should be dismissed as
 4 preempted and subsumed by their Title VI claim.

5 **D. Plaintiffs' Section 1983 Claim is Also Barred by the Eleventh Amendment**
 6 **Because Plaintiffs have Admitted that they Only Seek to Remedy a Past**
 7 **Action, i.e., Closure of the MK Middle Grades**

8 As discussed in defendants' initial memorandum, the *Ex Parte Young* exception to
 9 Eleventh Amendment immunity does not apply when the relief sought is retrospective in
 10 nature.

11 In their opposition, plaintiffs have framed "the issue in this case" as "whether
 12 Defendants discriminated against Native Americans students by closing the middle
 13 school grades at MKS..." (Opposition, p. 9, fn. 5.) This statement confirms the Eleventh
 14 Amendment bars that plaintiffs' § 1983 claim. The relief sought is retrospective: to
 15 "undo" the vote by the District's Board to close the middle grades at Margaret Keating
 16 school.

17 Defendants invite the Court's attention to *Students for a Conservative America v.*
 18 *Greenwood*, 378 F.3d 1129 (9th Cir. 2004). In that case, plaintiffs sued the University of
 19 Santa Cruz and the University's election commission under § 1983, challenging the
 20 University's election code and the commission's determination that the plaintiffs
 21 violated the code in a student election. Their complaint sought a court order requiring a
 22 new election. The issue on appeal was "whether the request for a new election falls
 23 within the exception to a State's Eleventh Amendment immunity that applies when a
 24 state official is sued for prospective injunctive relief." *Id.* at 1130. The Ninth Circuit
 25 affirmed dismissal of the complaint, stating: "We agree with the district court that the
 26 Eleventh Amendment precludes granting the plaintiffs' request for a new election

1 because it is not a request for prospective relief. Its purpose is to undo the results of an
2 election that has already been given effect.” *Id.*

3 Similarly, plaintiffs here seek to “undo” a previous determination by the Board to
4 close the MK middle school grades. Under the reasoning of the Ninth Circuit’s decision
5 in *Greenwood*, the relief requested is, in substance, retrospective. Thus, the § 1983
6 claim is barred by the Eleventh Amendment.⁴

7 The decision in *Office of Hawaiian Affairs v. Dept. of Education*, 951 F.Supp.
8 1484 (D. Hawaii 1996) is also instructive. The plaintiffs sued the State Dept. of
9 Education, its Board, their superintendent, and members of the Board under § 1983,
10 alleging that the failure to provide sufficient education in Hawaiian language and culture
11 in public schools. The plaintiffs alleged violation of their First and Equal Protection
12 rights, due to the State of Hawaii’s past discrimination against the use of Hawaiian
13 language in public schools. *Id.* at 1499. The plaintiffs sought a court order requiring the
14 Defendants (1) to provide sufficient resources (teachers, classrooms, and learning
15 materials) for Hawaiian immersion programs in public schools, (2) to devise a plan to
16 expand Hawaiian language programs, and (3) to develop a pool of teachers for Hawaiian
17 language immersion education. *Id.* Noting that “[c]ourts must ‘look to the substance
18 rather than the form of relief sought’ to determine whether the relief violates the
19 Eleventh Amendment,” (citing *Papasan v. Allain*, 478 U.S. 265, 279 (1996)), the court
20 concluded “that the relief which Plaintiffs seek is retrospective rather than prospective
21 because it addresses a past constitutional violation of when the State of Hawaii banned
22 the use of the Hawaiian language in schools.”) *Id.* at 1489-99.

23 Similarly, plaintiffs seek to remedy past alleged discrimination, i.e., the closure of
24 the MK middle grades, and references the alleged “historical record of discrimination
25

26 ⁴ In addition, as discussed in defendant’s initial memorandum, and *infra*, the relief requested is unconstitutional as a matter of law.

1 against Native Americans in the community.” (Complaint, ¶ 7; See also, Opposition, p.
 2 9, fn. 5, characterizing the issue in this case as “whether Defendants discriminated
 3 against Native Americans students by closing the middle school grades at MKS...” As in
 4 *Office of Hawaiian Affairs*, the “substance” of the relief sought by plaintiffs is
 5 retroactive, and, thus, the § 1983 claim is barred by the Eleventh Amendment.

6 Plaintiffs’ argue that their claim for declaratory relief evades the Eleventh
 7 Amendment immunity. This is not the law. “A declaratory judgment is not available
 8 when the result would be a partial “end run” around [the Eleventh Amendment].” *Green*
 9 *v. Mansour*, 474 U.S. 64, 73 (1985). See also, *Puerto Rico Aqueduct and Sewer*
 10 *Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (“[T]he [*Ex Parte Young*
 11 exception] is narrow: It applies only to prospective relief, and does not permit judgments
 12 against state officers declaring that they violated federal law in the past...”).

13 Accordingly, plaintiffs’ § 1983 claim should be dismissed for the additional reason
 14 that it is barred by the Eleventh Amendment.

15 **E. The Complaint Is Subject To Dismissal Because The Relief Sought Is**
 16 **Unconstitutional And Therefore Unavailable**

17 Defendants by no means intend to place plaintiffs (or plaintiffs’ counsel) in the
 18 company of those who have historically espoused racial segregation. The fostering of
 19 ancestral and cultural heritage – regardless of one’s race or national origin – is a laudable
 20 and worthy goal. However, “[t]he constitutional problems with government race-based
 21 decisionmaking are not diminished in the slightest by the presence or absence of an
 22 intent to oppress any race or by the real or asserted well-meaning motives for the race-
 23 based decisionmaking.” *Parents Involved v. Seattle School District*, __ U.S. __, 127 S.Ct.
 24 2736, 2774 (2007) (Thomas, J., concurring), citing *Adarand Construction, Inc. v. Pena*,
 25 515 U.S. 200, 228-229 (1995) (“As far as the Constitution is concerned, it is irrelevant
 26

Contrary to plaintiffs' assertion, the relief sought does not comport with the Equal Protection Clause or Title VI and is therefore "unavailable as a matter of law." Accordingly, the complaint should be dismissed. *Schweiker*, 487 U.S. at 429.

F. Conclusion

For all of the above-stated reasons, defendants are entitled to an order dismissing the complaint. Clearly, plaintiffs' section 1983 claim should be dismissed without leave to amend because it is preempted by the Title VI claim (and barred by the Eleventh Amendment), the state cause of action should be dismissed without leave to amend based on plaintiffs' concession that it is barred by the Eleventh Amendment, and the individual defendants should be dismissed from the Title VI claim, based on plaintiffs' concession that Title VI applies only to entity defendants.

More fundamentally, the complaint is defective at its core, and subject to dismissal, because plaintiffs request that the court issue an order, in effect, to "carry out a government policy to separate pupils in school based solely on race," which, as explained above, and in defendants' initial memorandum, is patently unconstitutional.

DATED: February 3, 2008

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